UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 2:18-CR-1087
	§	
LUIS ANGEL PEREZ-JIMENEZ; aka JIMENEZ; aka LUIS PEREZ-JIMENEZ	§	

ORDER GRANTING MOTION TO SUPPRESS AND TO DISMISS

Luis Angel Perez-Jimenez (Perez-Jimenez) is charged by indictment with illegal re-entry into the United States in violation of 8 U.S.C. § 1326. D.E. 6. Before the Court is Defendant's Motion to Suppress Evidence of Prior Removal (D.E. 13) alleging that the Government's predicate order of deportation is not valid. As a result, he argues, evidence of the order must be suppressed and, without that evidence, the indictment must be dismissed. The Government filed a response (D.E. 15) and the Court heard the motion on December 14, 2018. Both parties filed additional briefing. D.E. 20; D.E. 23. For the following reasons, Defendant's motion is GRANTED, the evidence of the order of removal is SUPPRESSED, and the indictment is DISMISSED.

FACTS

Perez-Jimenez's testimony at the hearing on this motion was uncontroverted and the Court accepts it as true. After entering the United States illegally as a child with his parents, Perez-Jimenez, a Mexican citizen, remained in this country for several years. On October 26, 2006, he was arrested in North Carolina for unlawfully carrying a concealed firearm, a misdemeanor. On the day he was sentenced to 45 days of time served, he received an INS Form I-862 "Notice to Appear." The notice, dated December 12, 2006,

alleged that he was an alien not admitted or paroled in the United States and directed him to appear before an immigration judge on April 19, 2007, in Atlanta, Georgia. Defendant's Exhibit 1.

While he was incarcerated, his parents retained an attorney for his immigration case.[1] The record shows that the attorney filed a notice of appearance for the limited purpose of requesting Freedom of Information Act documents from the immigration court. Defendant's Exhibit 4. That notice informed the court that "no hearing notices or orders of any kind" may be legally served on Perez-Jimenez through the attorney or his office. His parents later had trouble locating his attorney and Perez-Jimenez never communicated with him.

On February 13, 2007, Perez-Jimenez was again incarcerated on charges of breaking and entering and larceny. While in jail, he did not have access to a law library or a computer. As the day of his removal proceeding approached, he assumed that jail officials would transport him to the immigration court. But Perez-Jimenez remained confined in the Mecklenburg County jail in North Carolina while his hearing went forward in Georgia. When he inquired as to why he was not transported to his hearing, jail officials told him that if he had a hearing, immigration authorities would be responsible for transporting him. Because Perez-Jimenez was not in attendance and was not represented by counsel at his removal proceedings, the immigration judge ordered his removal from the United States *in absentia*. Several months passed before Perez-Jimenez learned of this.

[1] The record is unclear as to when his parents retained the attorney. Perez-Jimenez testified that they paid for an attorney when he was released from jail in December 2006. However, the attorney's notice of appearance is dated October 2006.

On August 2, 2007, after pleading guilty to breaking and entering and larceny, Perez-Jimenez was sentenced to five to six months of incarceration. Immediately after he completed his sentence, immigration officials acting on an immigration detainer transported him to a detention facility in Georgia. He was never advised of his right to challenge the removal order. Unable to contact his parents or seek legal assistance, he was deported to Mexico on October 4, 2007.

Since then, Perez-Jimenez has reentered the United States and been deported three times. On each occasion, the 2007 removal order was reinstated. Perez-Jimenez moves to suppress his prior removal order and dismiss the indictment, arguing that the 2007 removal order is void.

DISCUSSION

The offense of illegal re-entry requires a prior enforceable order of exclusion, deportation, or removal. 8 U.S.C. § 1326(a)(1). Indictments for illegal reentry are subject to dismissal where the predicate deportation proceeding is void for failing to conform with the alien's constitutional due process rights. *United States v. Mendoza–Lopez*, 481 U.S. 828, 829 (1987). "[A] collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review." *Id*. at 839. The *Mendoza-Lopez* holding has been codified to permit an alien's challenge to the deportation order upon a showing that:

> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d). "If the alien fails to establish one prong of the three part test, the Court need not consider the others." *United States v. Mendoza–Mata*, 322 F.3d 829, 832 (5th Cir. 2003). According to the Fifth Circuit, the defendant must also show that he suffered actual prejudice to successfully challenge the predicate deportation order. *United States v. Lopez-Ortiz*, 313 F.3d 225, 229 (5th Cir. 2002). The Court finds that Perez-Jimenez has proven each of the statutory elements, along with the actual prejudice requirement.

1. Exhaustion of Administrative Remedies

Perez-Jimenez is required to have exhausted all available administrative remedies at the time of his removal order. Ordinarily, an alien's failure to challenge the order—either on direct appeal or in a motion to reopen—before the Board of Immigration Appeals (BIA) is a jurisdictional bar to judicial review. *Wang v. Ashcroft*, 260 F.3d 448, 452-53 (5th Cir. 2001). Because there is no right to appeal a deportation order made *in absentia*, Perez-Jimenez's remaining remedy was a motion to reopen to rescind the order of deportation.[2] *See* 8 C.F.R. § 1240.15 ("[A]n appeal shall lie from a decision of an Immigration Judge to the Board, except that no appeal shall lie from an order of

[2] In its briefing, the Government lists several types of immigration relief generally available. D.E. 23, pp. 4-5. However, the Government conflates the exhaustion element with the actual prejudice requirement, which is discussed later. Under the exhaustion requirement, Perez-Jimenez had to challenge his removal order through BIA remedies. He was not required to apply for immigration relief through cancellation of removal, voluntary departure, or adjustment of status. *See generally Wang*, 260 F.3d at 452.

deportation entered in absentia."); *see also* 8 U.S.C. § 1229a(b)(5)(C)(ii) (allowing an alien, in State or Federal custody at the time of the proceeding, to request a rescission of the order through a motion to reopen).

Perez-Jimenez admits that he did not file a motion to reopen in 2007. Because he had no opportunity to attend the removal proceeding, did not receive actual notice of his removal until he was detained by immigration authorities, and had no access to legal assistance during that detention, he asserts that the only administrative remedy that applied, a motion to reopen, was effectively unavailable. The Court agrees.

In *United States v. Villanueva-Diaz*, the Fifth Circuit held that the collateral attack on the order of removal was not barred by the failure to exhaust administrative remedies if there were no remedies available at the time of removal. 634 F.3d 844, 849 (5th Cir. 2011) (citing 8 U.S.C. § 1326(d)(1)). In *Villanueva-Diaz*, the defendant was in custody when his attorney appealed the deportation order. *Id.* at 846-47. Because his attorney stopped communicating with him and failed to give him a copy of the BIA's decision, he did not know that his appeal was denied until he was physically removed from the United States. *Id*. The Fifth Circuit held that the motion to reopen was not an "available" remedy for him. *Id.* at 849.

Although *Villanueva-Diaz* is factually distinct, its holding is instructive. The immigration judge was required to advise Perez-Jimenez of the removal order. *See* 8 C.F.R. § 1240.13. There is no evidence that the court sent Perez-Jimenez a copy of the order. He testified that he did not receive actual notice of the order until he was transported to an immigration detention center, where he had no access to legal resources

and could no longer communicate with his parents. Although he had a right to move to reopen the proceedings, he had no ability to exercise that right prior to his removal.

The Government argues that Perez-Jimenez could have filed a motion to reopen after he was deported to Mexico. Courts ordinarily apply the exhaustion requirement to remedies available to the alien before deportation. *See Villanueva-Diaz*, 634 F.3d at 849 (reviewing remedies available pre-deportation); *see also United States v. Hinojosa-Perez,* 206 F.3d 832, 836 (9th Cir. 2000); *United States v. Montano-Bentancourt*, 151 F. Supp. 2d 794, 798 (W.D. Tex. 2001) ("Since the deportation itself executes the order, administrative remedies that come after the deportation would not appear to constitute relief from the order.").

The Fifth Circuit has held that an individual is not required to exhaust administrative remedies that would be futile. *Goonsuwan v. Ashcroft*, 252 F.3d 383, 389 (5th Cir. 2001). At the time of Perez-Jimenez's removal, the regulations prevented a deported alien from filing a motion to reopen. *See* 8 C.F.R. § 1003.2(d) ("A motion to reopen . . . shall not be made by or on behalf of a person who is the subject of . . . removal proceedings subsequent to his or her departure from the United States."); *see also Villanueva-Diaz*, 634 F.3d at 849 ("[O]nce removed, the BIA would have refused to take jurisdiction of [defendant's] motion to reopen."); *but see Garcia-Carias v. Holder,* 697 F.3d 257, 264 (5th Cir. 2012) *(*holding that the BIA's departure bar conflicts with the statutory right to file a motion to reopen, and thus, is invalid). Moreover, an individual forfeits the right to file a motion to reopen by reentering the country illegally. *Rodriguez-Saragoza v. Sessions*, 904 F.3d 349, 354 (5th Cir. 2018) (citing 8 U.S.C. § 1231(a)(5)).

Thus, efforts by Perez-Jimenez to reopen his removal proceedings after his removal to Mexico would have been futile.

Because a motion to reopen was not an available remedy for Perez-Jimenez, his failure to exhaust administrative remedies is not a bar to his collateral attack.

2. Opportunity for Judicial Review

For the same reason he was denied the opportunity to file a motion to reopen, Perez-Jimenez has also established that he was deprived of judicial review. Procedural errors in his removal hearing effectively eliminated Perez-Jimenez's right to challenge the hearing by means of judicial review of the order. *See United States v. Cordova-Soto,* 804 F.3d 714, 718-19 (5th Cir. 2015) (citing 8 U.S.C. § 1326(d)(b)). Such errors prevented him from "being aware of, much less pursuing, judicial review." *United States v. Segundo,* 4:10-CR-0397, 2010 WL 4791280, at *9 (S.D. Tex. Nov. 16, 2010). Given that Perez-Jimenez was never informed of his right to challenge the removal order, he was unaware of any available judicial review.

Furthermore, courts have held that an incarcerated alien is deprived of judicial review when the alien is not provided notice of the removal order entered *in absentia* until he is in the process of being deported. *See United States v. Munoz-Giron,* 943 F. Supp. 2d 613, 622 (E.D. Va. 2013); *see also United States v. Canedo-Reyna,* CR08-00040-TUCFRZCRP, 2008 WL 4079987, at *4 (D. Ariz. Aug. 29, 2008). While judicial review is technically available to an incarcerated alien, a short lapse of time between the alien's removal order and his deportation is "'too brief to afford a realistic opportunity of filing a habeas petition.'" *Munoz-Giron,* 943 F. Supp. 2d at 622 (quoting *United States v.*

Copeland, 376 F.3d 61, 68 (2d Cir. 2004)). Perez-Jimenez only had a short time to pursue judicial remedies between the time he learned of the removal order and his deportation. Thus, these procedural errors foreclosed Perez-Jimenez's opportunity for judicial review.

3. Fundamental Unfairness

Perez-Jimenez must demonstrate that the removal proceeding was fundamentally unfair, such that the error in the hearing violated his Fifth Amendment right to due process. *See United States v. Lopez-Vazquez,* 227 F.3d 476, 484 (5th Cir. 2000)*; see also Patel v. I.N.S.,* 803 F.2d 804, 806 (5th Cir. 1986). "'[D]ue process requires only that an alien be provided notice of the charges against him, a hearing before an executive or administrative tribunal, and a fair opportunity to be heard.'" *Cordova-Soto*, 804 F.3d at 720 (quoting *United States v. Benitez-Villafuerte*, 186 F.3d 651, 657 (5th Cir. 1999)).

Because his removal was ordered *in absentia* while he remained in jail, Perez-Jimenez was not afforded a right to appear at the hearing or a fair opportunity to be heard. In *United States v. Munoz-Giron*, the court reviewed the statute[3] addressing when an alien against whom a deportation order is entered *in absentia* may seek rescission of the order. Congress provided a safety valve for individuals who failed to appear at a deportation proceeding if they could show that their absence was due to exceptional circumstances defined by statute, they did not receive notice of the proceeding, or they were in Federal or State custody and did not appear through no fault of their own. 943 F. Supp. 2d at 627. Because Munoz-Giron was in custody at the time of his hearing, the

[3] 8 U.S.C. § 1252b(c)(3) (repealed 1996); *but see* 8 U.S.C. § 1229a(b)(5)(C)(ii) (Act effective Jan. 5, 2006).

court found there was reasonable cause for his absence from the hearing.[4] Thus, the decision to hold the deportation proceeding *in absentia* was in error and the proceeding was procedurally defective. *Id.*

The Government argues that an immigration judge's failure to explain eligibility for discretionary relief to an alien in removal proceedings "does not rise to the level of fundamental unfairness." *See United States v. Rodriguez-Aparicio*, 888 F. 3d 189, 196 (5th Cir. 2018) (cert. denied). According to the Government, Perez-Jimenez has no due process interest in requesting voluntary departure, a form of discretionary relief. However, the denial of the right to attend the hearing and a fair opportunity to be heard warrant due process protection. *See Lopez-Ortiz,* 313 F.3d at 230-31. An immigration judge's failure to notify an individual of his eligibility for discretionary relief is not analogous to holding a hearing *in absentia* while the individual sits in jail. Because Perez-Jimenez was denied the right to attend his hearing and a fair opportunity to be heard, the immigration court's order of removal entered *in absentia w*as fundamentally unfair.

4. Actual Prejudice

Perez-Jimenez must also show that he suffered actual prejudice. The Fifth Circuit has held that a showing of prejudice means there was "a reasonable likelihood that but for the errors complained of the defendant would not have been deported." *Benitez-Villafuerte,* 186 F.3d at 651 (internal quotation marks and citations omitted). The

[4] *Munoz-Giron* addressed a statute that required "reasonable cause" for an alien's absence from a deportation proceeding. 943 F. Supp. 2d at 625-26 (citing 8 U.S.C. § 1252(b) (1994 & Supp. 1997)). However, this language was omitted from the statute in effect at the time of Perez-Jimenez's 2007 removal proceeding. *See* 8 U.S.C. § 1252 (Act effective May 11, 2005).

prejudice inquiry focuses on the time period leading up to the deportation, not on any crimes occurring afterward. *United States v. Scott*, 394 F.3d 111, 118 (2d Cir. 2005). Perez-Jimenez argues that had he attended his removal proceeding, he could have requested voluntary departure, which would have allowed him to depart the United States in lieu of being deported.[5] *See* 8 U.S.C. § 1229c. The Government claims that even if Perez-Jimenez met the eligibility requirements for voluntary departure, the immigration judge would not have granted him relief.[6]

In determining whether to grant voluntary departure, the immigrant judge considers the following factors:

> the nature and underlying circumstances of the deportation ground at issue; additional violations of the immigration laws; the existence, seriousness, and recency of any criminal record; and other evidence of bad character or the undesirability of the applicant as a permanent resident . . . [as well as] compensating elements such as long residence here, particularly if from childhood; close family ties in the United States, or humanitarian needs.

In re Arguelles–Campos, 22 I & N Dec. 811, 818 (B.I.A. 1999) (citing *In re Gamboa*, 14 I & N Dec. 244 (B.I.A. 1972)). The Government argues that Perez-Jimenez's admission of prior gang association in 2005, conviction for carrying a concealed firearm in 2006,

[5] An immigration judge may grant voluntary departure upon a finding that the (1) alien has been physically present in the United States for at least one year, (2) has been a person of good moral character for at least 5 years, (3) is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4), and (4) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so. 8 U.S.C. § 1229c(b)(1). Perez-Jimenez's conviction for possessing a firearm would not have prevented a showing of good moral character. *See Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 809 (9th Cir. 2015); *see also* 8 U.S.C. § 1101(f) (Act effective July 27, 2006 to Sept. 30, 2008).

[6] The Government's suggestion that a deportable alien is not actually harmed when discretionary relief is denied is inconsistent with precedent. *See, e.g.*, *Mendoza-Mata,* 322 F.3d at 833 (reviewing whether the individual qualified for discretionary relief to establish actual prejudice).

and arrest in 2007 made it unlikely that he would have been granted voluntary departure. However, Perez-Jimenez had several compensating elements at the time of the hearing. He had lived in the United States since childhood, had only a misdemeanor conviction, was 17-years-old at the time of his first arrest, and had family ties in the United States, working for his father in the construction business. *See United States v. Alcazar-Bustos,* 382 Fed. App'x 568, 569–71 (9th Cir. 2010) (holding that voluntary departure was plausible where defendant had resided in the United States since infancy and had a wife and child who were citizens of the United States, even though he had firearm possession convictions, associations with gang members, and prior drug use).

Because he has established his eligibility for voluntary departure and a reasonable likelihood that the immigration judge would have granted him relief, Perez-Jimenez suffered actual prejudice when his removal was ordered *in absentia*. Thus, he has satisfied each requirement of collateral attack on his predicate order of deportation.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant Luis Angel Perez-Jimenez's motion (D.E. 13). Thus, the evidence of his predicate deportation order is SUPPRESSED and the Indictment (D.E. 6) is DISMISSED.

ORDERED this 15th day of March, 2019.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE